MBf Insurans Sdn Bhd v Penang Garden Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–02–164 OF 1996
ALAUDDIN FCJ, ABDUL AZIZ MOHAMAD JCA AND RAUS J
27 JULY 2004

Insurance — Contractor's all risk policy — Claim for loss and damage — Extended cover for loss or damage occurring to structures in vicinity — Third party liability in connection with construction and erection — Cost of remedial works for adjacent building — Whether respondent entitled to be indemnified

Words and Phrases — 'Collapse' — Meaning of

The respondent was the developer of the project known as Wisma Penang Garden. By a Contractor's All Risk Policy, the appellant insured the respondent and others, in respect of certain construction works to be carried out by respondent's contractor. The project was divided into two phases. Phase I was an 11-storey building with a two storey annex duly completed and occupied. Phase II was a 17-storey building adjacent to phase I.

The policy coverage included loss or damage in relation to the construction of phase II, as well as for the third party liability in connection with the construction and erection of phase II and in the event of any occurrence which might give rise to a claim under the policy, the respondent shall take all steps within its power to minimise the extent of the loss and damage. Further, by endorsement 105 of the policy, the insurance was extended to cover loss or damage occurring in connection with the insured contractor's works to the structures in phase I.

Upon the commencement of the piling operations on phase II, it was observed that the building structures in phase I were settling and tilting at a high rate. As a result, the piling works were suspended. Remedial works were immediately undertaken by the respondent. Thus, the respondent's claim in respect of all the expenditures, losses and damages incurred and sustained by it, due to the said remedial works.

The High Court allowed the respondent's claim. This was the appellant's appeal against the said decision. The issue before this court was whether the respondent was entitled to be or not to be indemnified in respect of all expenditures incurred and sustained by the respondent in carrying out the remedial works.

Held, allowing the appeal:

(1) (per **Abdul Aziz Mohamad JCA**) There is no necessity to resort to the general condition 5(b) under the policy whereby it is clearly imposed on the respondent a duty to mitigate damage, the discharge of which must, by the nature of the duty, be financially borne by the respondent. Further, the expenses of the steps under general condition 5(b) must be borne by the respondent would not only be a natural and logical

consequence of the steps being, in the nature of a duty to mitigate damage, but was also consistent with general condition 3 which imposed a duty on the respondent to take all reasonable precautions to prevent loss, damage or liability at their own expenses (see paras 16–17).

(2) (per **Abdul Aziz Mohamad JCA**) The bargain between the parties by virtue of the extended cover under endorsement 105 was that the appellant would be liable only if, despite those measures, which must be paid for by the respondent, the buildings in phase I suffered a total or partial collapse (see para 19).

(3) (per **Raus J**) The policy must be read as a whole. General condition 5 must be read in the light of both endorsement 105 and general condition 3. Endorsement 105 expressly states that safety measures are not indemnifiable under the policy and coupled with general condition 3 which expressly states that reasonable precautions to prevent loss or damage are at the respondent's expenses (see paras 31–33).

(4) (per **Raus J**) The word 'collapsed' which was used in the policy has only one ordinary meaning that is falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support which means that the building must cave in or fall down. Thus, when the words of the policy are crystal clear, those words must be given effect to. As such, the building in phase I must fall down either totally or partially, for the appellant to be liable. It was undisputed that, although phase I building suffered serious cracks and settlement, it remained standing (see paras 34, 36).

[Bahasa Malaysia summary

Responden adalah pemaju projek yang dikenali sebagai Wisma Penang Garden. Menerusi satu polisi 'Contractor's All Risk' ('polisi tersebut'), perayu telah menginsuranskan responden dan yang lain-lain, terhadap beberapa kerja-kerja pembinaan yang akan dilakukan oleh kontraktor responden. Projek tersebut dibahagikan kepada dua fasa. Fasa I adalah bangunan 11 tingkat dengan dua bangunan bersambung yang telah disiap dan dihuni. Fasa II adalah bangunan 17 tingkat bersebelahan fasa I.

Liputan polisi tersebut termasuk kehilangan atau kerugian terhadap pembinaan fasa II, termasuk liabiliti pihak ketiga yang berkaitan dengan kerja-kerja pembinaan fasa II dan sekiranya terdapat apa-apa kejadian yang boleh mewujudkan tuntutan di bawah polisi tersebut, responden hendaklah mengambil langkah-langkah yang sewajarnya mengikut kuasanya untuk mengurangkan had kehilangan dan kerugian. Malah, menerusi indorsmen 105 polisi tersebut, insurans tersebut telah diluaskan untuk meliputi kehilangan atau kerugian yang wujud kepada struktur fasa I akibat kerja-kerja kontrak.

Apabila kerja-kerja asas di fasa II dimulakan, adalah didapati bahawa struktur di fasa I mula bergerak dan condong secara mendadak. Akibatnya, kerja-

kerja asas telah ditangguhkan. Kerja-kerja remedi telah dilaksanakan secara serta-merta oleh responden. Maka, responden telah menuntut terhadap perbelanjaan, kehilangan dan kerugian yang wujud akibat kerja-kerja remedi tersebut.

Mahkamah Tinggi telah membenarkan tuntutan responden. Ini adalah rayuan terhadap keputusan tersebut. Isu di hadapan mahkamah ini adalah sama responden berhak atau tidak berhak untuk dilepaskan daripada tanggungan kerugian terhadap kesemua perbelanjaan yang timbul dan wujud akibat perlaksanaan kerja-kerja remedi.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Abdul Aziz Mohamad HMR**) Tidak terdapat keperluan untuk menggunakan syarat am 5(b) tersebut di bawah polisi tersebut yang mana jelas mengenakan terhadap responden tugas untuk mengurangkan ganti rugi, pelepasan yang mana semestinya, menurut sifat tugas tersebut, hendaklah dari segi kewangan di tanggung oleh responden. Selanjutnya, perbelanjaan segala langkah-langkah yang diambil di bawah syarat am 5(b) hendaklah ditanggung oleh responden bukan sahaja disebabkan oleh kesan langkah-langkah asal dan logik sifat tugas untuk mengurangkan ganti rugi, akan tetapi juga selaras dengan syarat am 3 yang mana mengenakan tugas terhadap responden untuk mengambil segala langkah-langkah pengawasan untuk mengelakkan kehilangan, kerugian atau liabiliti di atas perbelanjaan responden sendiri (lihat perenggan 16–17).

(2) (oleh **Abdul Aziz Mohamad HMR**) Perjanjian tersebut di antara kedua-dua pihak mengikut perluasan liputan di bawah indorsmen 105 adalah bahawa perayu hanya akan bertanggungan sekiranya, meskipun langkah-langkah telah diambil, yang mana perbelanjaannya hendaklah dibayar oleh responden, bangunan di fasa I mengalami keruntuhan keseluruhan atau sebahagian (lihat perenggan 19).

(3) (oleh **Raus H**) Polisi tersebut hendaklah dibaca secara keseluruhan. Syarat am 5 hendaklah dibaca bersama-sama dengan kedua-dua indorsmen 105 dan syarat am 3. Indorsmen 105 secara jelas memperuntukkan bahawa langkah-langkah keselamatan tidak boleh dikenakan tanggungan di bawah polisi dan bersama dengan syarat am 3 yang secara jelas memperuntukkan bahawa langkah-langkah keselamatan yang munasabah untuk mengelakkan kehilangan atau kerugian adalah di atas perbelanjaan responden sendiri (lihat perenggan 31–33).

(4) (oleh **Raus H**) Perkataan 'runtuh' yang telah digunakan di dalam polisi tersebut hanya mempunyai satu maksud biasa iaitu 'falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support' yang mana bermaksud bangunan tersebut hendaklah roboh atau jatuh ke bawah. Maka, apabila perkataan-perkataan polisi tersebut adalah jelas, perkataan-perkataan tersebut hendaklah diberikan kesan sepenuhnya. Oleh yang demikian, bangunan di fasa I hendaklah jatuh ke bawah secara keseluruhannya atau

sebahagiannya, untuk perayu bertanggungan. Adalah tidak dipertikaikan, bahawa walaupun bangunan di fasa I mengalami keretakan dan pengalihan, ia masih tegak (lihat perenggan 34, 36).]

Notes

For cases on claim on loss and damage, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 59.

Cases referred to

Anderson v Indiana Lumbermen's Mutual Insurance Co of Indianapolis, Indiana 127 Southern Reporter (2nd Series) 304 (not folld)

Pans Food Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd [2000] 74 ALJR 79 (not folld)

Appeal from: Civil Suit No 23–91 of 1987 (High Court, Pulau Pinang)

Rajashree Suppiah (Abdullah bin Abdul Rahman with her) (Cheang & Ariff) for the appellant.

RJ Manecksha (Ong & Manecksha) for the respondent.

Abdul Aziz Mohamad JCA:

[1] The respondent company undertook the development of a land of theirs by a project known as Penang Garden. The project had two phases. Phase I was the construction of two buildings, a two-storey building called the Citibank Building and an 11-storey building called Wisma Penang Garden, which was connected to the Citibank Building by a walkway. The Citibank Building was occupied in 1980. In the course of its construction, Wisma Penang Garden suffered settlement and tilting. Remedial measures were taken to arrest the settlement and tilting of Wisma Penang Garden. Those measures were completed in June 1982 and occupation of the building commenced in June 1983.

[2] Phase II, which was adjacent to phase I, was the construction of a 17-storey tower block, for which the main contractor was IGB Construction Sdn Bhd. Due to the experience of the settlement and tilting that had occurred to Wisma Penang Garden when it was being constructed in phase I, elaborate instrumentation was installed to monitor the stability of the two buildings in phase I in the course of the construction of the tower block in phase II, which did not commence until after the two buildings in phase I had been completed and occupied.

[3] In respect of phase II, the respondents took out a Contractors' All Risks Policy from the appellant company on 10 August 1984, with cover from that date until 31 December 1986. By what was called endorsement 105, the policy was extended to relate to the two buildings in phase I that had been completed.

[4] On 1 October 1984 piling works for the construction of the tower block in phase II commenced. On 18 December 1984, the monitoring instruments that had been installed detected that the two buildings in phase I were settling and tilting at a high rate. The piling works were stopped. To save the two buildings the respondents caused certain works to be carried out. They consisted of the construction of a curtain-wall, which was a line of piles to form a wall along the boundary of phase I and phase II to prevent soil movement, and grouting, which was the pumping of cement slurry into the ground to establish a firm foundation. The works succeeded to arrest the settlement and tilting of the two buildings of phase I, and the construction of the tower block in phase II resumed to completion.

[5] In the High Court, the respondents claimed from the appellants under the policy a sum of RM1,968,646.90, which the respondents' first witness said was the cost of those works, which he described as remedial works. It was agreed that if the appellants were liable under the policy for the cost of those works the correct sum should be RM1,327,441.40. The trial judge found the appellants liable and ordered them to pay that sum to the respondents with interest.

[6] We allowed the appellants' appeal, finding that the judge erred in finding them liable under the policy.

[7] Before I deal with the provisions of the policy to show why the sum claimed was not covered by the policy, let me emphasize that the sum claimed was not an amount incurred by the respondents in repairing any damage to either of the buildings in phase I but was a sum incurred by them in having what the respondents' first witness called remedial works carried out to prevent damage or further damage to the two buildings from settlement and tilting.

[8] The policy was taken out primarily for phase II. It had two sections. Section II was not material because it related to third-party liability. It was section I that was material. The section began with an indemnity clause in these words:

> The Insurers hereby agree with the Insured that if at any time during the period of cover the items or any part thereof entered in the Schedule shall suffer any unforeseen and sudden physical loss or damage from any cause, other than those specifically excluded, in a manner necessitating repair or replacement, the Insurers will indemnify the Insured in respect of such loss or damage as hereinafter provided by payment in cash, replacement or repair (at their own option) …

[9] The policy was to indemnify the respondents in respect of any 'unforeseen and sudden physical loss and damage' suffered by any item in the Schedule, which loss or damage was 'in a manner necessitating repair or replacement' of the item. The Schedule related to the construction of the tower block in phase II and set out several items as insured items. These included the contract work, including materials to be incorporated in it; materials supplied by the respondents; construction plant and equipment; and construction machinery.

It was those and other items that were insured against 'unforeseen and sudden physical loss and damage'. There was no question of insuring the tower block itself because it had not yet come into existence.

[10] It was only by virtue of endorsement 105 that the policy was extended so as to relate to the two buildings in phase I which were already in existence and occupied. Endorsement 105 had seven paragraphs. The last two were not relevant in the appeal because they related to financial limits of the indemnity. The first five paragraphs were as follows:

> It is agreed and understood that otherwise subject to the terms, exclusions, provisions and conditions contained in the Policy or endorsed thereon and subject to the Insured having paid the agreed extra premium, this insurance shall be extended according to the provisions stated below to cover loss or damage occurring in connection with the insured contract works to the structures stated below:
>
> Surrounding building in the vicinity of the site at Jalan Sultan Ahmad Shah (Northam Road), Penang known as Wisma Penang Garden.
>
> Loss or damage to the above-mentioned structures is only covered if prior to the commencement of the works their condition is satisfactory and/or the necessary safety measures have been taken. The Insured shall produce together with the Insurers a report stating the condition of the structures before the beginning of the works.
>
> Should further safety measures become necessary during construction, the expenses incurred for such measures are not indemnifiable under the Policy.
>
> In respect of loss or damage resulting from underpinning, tunnelling or other operations involving supporting elements or the subsoil, the indemnity shall be restricted to total or partial collapse.
>
> Cracks that neither impair the stability of the structure nor the safety of its users are not covered.

[11] The first paragraph was the key paragraph. Although 'the structures stated below' were described as they were, there was no dispute that the structures intended were or included the two buildings in phase I. By that paragraph the policy was extended 'to cover loss or damage occurring … to the structures', that is to say, to the two buildings. I have omitted the words 'in connection with the insured contract works' in order to bring out with clarity that the loss or damage covered by the policy was loss or damage occurring to those buildings — occurring, that is, 'in connection with the insured contract works', that is, the phase II contract works. What it all amounted to was that if, on account of the works in phase II, loss or damage occurred to the two buildings in phase I, the first paragraph of endorsement 105 covered the loss or damage. Other forms of loss or damage were excluded by the cover of the first paragraph, and the exclusion was effected by specifying that it was loss or damage occurring to the buildings that was covered. What was not stated to be covered must be taken to be excluded.

[12] Even so, not every occurrence of loss or damage to the buildings would be covered by endorsement 105. According to the second paragraph, loss or damage occurring to the two buildings would not be covered if, prior to the commencement of works in phase II, the condition of the two buildings had not been satisfactory or the necessary safety measures had not been taken. That exception must have been necessary because of what had happened to one of the buildings, Wisma Penang Garden, during its construction in phase I. But if safety measures had been taken prior to the commencement of the works in phase II, it was only to qualify for the cover afforded by endorsement 105, which was cover only for loss or damage occurring to the buildings. The cost of the safety measures was not covered by endorsement 105 but must be borne by the respondents. The third paragraph was merely a kind of for-the-avoidance-of-doubt paragraph to expressly exclude from the cover of endorsement 105 expenses for safety measures that should become necessary during the construction of phase II despite the safety measures that had been taken prior to the construction of phase II. Even if the third paragraph did not exist, the cover afforded by the key first paragraph would, by itself, as I said, exclude the cost of safety measures as well as other kinds of loss or damage that were not loss or damage to the two buildings. Further, according to the fourth paragraph — which was commonly accepted as applicable to the effects of piling works in phase II, and in which 'loss or damage' must be construed in the light of the key first paragraph to mean loss or damage to the two buildings in phase I — if loss or damage to the two buildings was the result of piling works in phase II, it would be covered only if the loss or damage took the form of total or partial collapse of the buildings, not if the loss or damage took any less severe form. The fourth paragraph also must have been framed having in mind what had happened to Wisma Penang Garden during its construction. Finally, according to the fifth paragraph, loss or damage to the two buildings that merely took the form of cracks that neither impaired the stability of the buildings nor the safety of the users of the buildings was, in any case, not covered.

[13] What I have been trying to show is that if at all a claim in reliance on the extended cover of endorsement 105 was to succeed it must, as a first requirement, be a claim for loss or damage to either of the buildings in phase I. Any other claim could not even begin to come in for consideration under endorsement 105. The claim in this case was not, as I have emphasized, a claim for loss or damage to the two buildings. It was a claim for the cost of works to prevent loss or damage to the buildings, whether they be called safety measures or remedial works. Endorsement 105 covered only loss or damage to the two buildings. It did not cover safety measures or remedial works to prevent loss or damage to the two buildings. A claim for loss or damage to the two buildings would be a claim for the cost of repairing or undoing, if such were possible, the settlement and tilting of the two buildings that occurred during the piling works for phase II and the consequences of the settlement and tilting. A claim for the expenses of works to prevent further settlement and tilting was not a claim for any loss or damage that had occurred to the buildings.

[14] I was for those reasons of opinion that the respondents' claim was not covered by endorsement 105. A

[15] In respect of the fourth paragraph of endorsement 105 there was some argument in the appeal as to the meaning of 'collapse' in connection with the question whether the two buildings in phase I had suffered total or partial collapse as a result of the piling works in phase II. But in my judgment, while I was clearly of the view that by no means could it be said that there was even a partial collapse, the question was entirely irrelevant. The question would be relevant only if the claim of the respondents was for loss or damage to the two buildings in the form or as a result of their settling and tilting, but, as I said, it was not. B C

[16] Once it becomes clear that endorsement 105 by its very terms did not cover the cost of remedial works or safety measures, it should not be difficult to see that general condition 5(b) of the policy, on which the respondents' counsel placed heavy reliance in the appeal, saying that it was the linchpin of the decision of the trial judge, could not avail the respondents. General condition 5 said that, 'in the event of any occurrence which might give rise to a claim under this Policy, the Insured shall' do certain specified things, one of which, according to paragraph (b), was to 'take all steps within his power to minimize the extent of the loss or damage'. The respondents in their submission in the appeal recognized that general condition 5(b) imposed a duty on them to minimize the extent of loss or damage. It was a duty to mitigate damage and must therefore be discharged at the respondents' expense. But the respondents in their written submission attempted to use general condition 5(b) in their favour in a nebulous argument couched in these words: D E

> It is SUBMITTED that the imposition on the respondent of a duty to act in this way to prevent the occurrence of further and more serious loss or damage is balanced by an implied obligation on the part of the appellant to indemnify the Respondent in respect of the cost of remedial measures. F

[17] From their counsel's oral submission it became clear that the 'implied obligation' mentioned in that passage was intended to refer to the fourth paragraph of endorsement 105. It appeared to me that the efficacy of the resort to general condition 5(b) was predicated on the existence of an implied obligation in the fourth paragraph of endorsement 105 to indemnify the respondents in respect of the cost of remedial measures. The argument seemed to be that since under the fourth paragraph the appellants would be liable to indemnify the respondents only if the buildings suffered total or partial collapse, measures taken by the respondents to prevent total or partial collapse which would inevitably happen had those measures not been taken must impliedly, to give the Policy business efficacy and as something that the 'officious bystander' would say to be a matter of course, be indemnified for by the appellants. But such an implication could not be imported into the fourth paragraph if endorsement 105 clearly intended otherwise. As I said, the fourth paragraph, as was the entire Endorsement 105, was concerned only with covering loss or damage to the buildings. Further, if there was G H I

such an implied obligation in the fourth paragraph, I could not see why it was necessary to resort to general condition 5(b), which negated such an implied obligation, being, as I said, a provision that imposed on the respondents a duty to mitigate damage, the discharge of which must, by the nature of the duty, be financially borne by the respondents. In my judgment, resort to general condition 5(b) did nothing to advance the respondents' case. On the contrary, if I was right that the expenses of the steps taken under general condition 5(b) were to be borne by the respondents, general condition 5(b) operated against the respondents' claim. That the expenses of the steps under general condition 5(b) must be borne by the plaintiffs would not only be a natural and logical consequence of the steps' being, as I have said, in the nature of a duty to mitigate damage, but was also consistent with general condition 3 which imposed a duty on the respondents 'at [their] own expense' to 'take all reasonable precautions … to prevent loss, damage or liability …'.

[18] In the concluding paragraph of his grounds of judgment, the learned trial judge said the following:

> In addition to the foregoing, reading the policy as a whole together with the deletions and endorsements adverted to earlier in this judgment, I found the defendant liable to indemnify the plaintiff for the remedial measures taken to prevent a total or partial collapse of the buildings in Phase 1 which would most likely have resulted had not such measures been taken. It would be absurd to expect the plaintiff to allow the buildings in Phase 1 to collapse partially or totally in order to be indemnified.

[19] It was a conclusion that must have been made on an acceptance of the argument as to the implied obligation that the respondents contended existed in the fourth paragraph of endorsement 105. The last sentence reveals the thinking in the judge's mind that it was sensible for the respondents to take remedial measures to prevent the partial or total collapse of the buildings instead of not taking those measures and letting the buildings collapse and then claiming for the loss or damage, and that therefore the appellants were liable to indemnify the respondents for the remedial measures. But that was not the bargain in the policy. The bargain was that the respondents had to take remedial or preventive measures and bear the cost of them, and if they failed to do so and the buildings suffered a collapse, total or partial, as a result of piling works in Phase II the appellants would not be liable for the loss or damage. The bargain was that the appellants would be liable only if, despite those measures, which must be paid for by the respondents, the buildings suffered a total or partial collapse. That was the extent of risk that the appellants were prepared to bear. It was a great risk of the worst contingency happening, but the appellants were prepared to bear that risk on condition that the respondents took safety or preventive measures which must be paid for by them. There was nothing absurd in such a bargain in view of what had happened to Wisma Penang Garden when it was being constructed.

[20] My learned brother, Alauddin FCJ, to whom I forwarded a copy of the text of these grounds of judgment, has expressed his agreement with the text.

Raus J:

[21] This is an appeal against a decision of the High Court made on the 26 February 1996. The High Court declared that by a Contractor's All Risk Policy dated 10 August 1984, the respondent is entitled to be indemnified in respect of all expenditure, losses and damages incurred and sustained by them in consequence of carrying out remedial works to the site it was piling as well as to adjoining buildings.

[22] The respondent was the developer of the project known as Wisma Penang Garden. The project was divided into two phases. Phase I was an 11-storey building with a two storey annex. Phase II was a 17-storey building adjacent to phase I. Phase I was duly completed and occupied in 1983. The piling and foundation works for phase II started in October, 1984.

[23] By a Contractor's All Risk Policy dated 10 August 1984, the appellant insured the respondent and others, in respect of certain construction works to be carried out by respondent's contractor. The policy coverage includes loss or damage in relation to the construction of phase II, as well as for the third party liability in connection with the construction and erection of phase II. The policy further provided that in the event of any occurrence which might give rise to a claim under the policy, the respondent shall take all steps within its power to minimise the extent of the loss and damage. Further, by endorsement 105 of the policy, the insurance was extended to cover loss or damage occurring in connection with the insured contractor's works to the structures in the vicinity of the site.

[24] Upon the commencement of the piling operations on phase II, it was observed that the building structures on phase I were settling and tilting at a high rate. As a result, the piling works were suspended. Remedial works were immediately undertaken by the respondent.

[25] Thus, the claim by the respondent in this case was in respect of all the expenditures, losses and damages incurred and sustained by it, due to the said remedial works. It was agreed by the parties that the amount claimed be limited to RM 1,327,441.40 as the measure of damages.

[26] The central issue in this appeal is whether or not the respondent is entitled to be indemnified in respect of all expenditures incurred and sustained by the respondent in carrying out the remedial works in order to save the building in phase I from 'further settlement and irreversible deterioration'.

[27] The fourth paragraph of endorsement 105 of the policy expressly states as follows:

> In respect of loss or damage resulting from underpinning, tunneling or other operations involving supporting elements or the subsoil, the indemnity shall be restricted to *total or partial collapse*. (Emphasis added.)

[28] There is no dispute that the piling works falls within the above clause. But what is in dispute is the definition of the word 'collapse'. It is the contention of the respondent that when remedial works were undertaken, actual collapse was under way. Therefore, the indemnity as appear in the fourth paragraph of endorsement 105 would have operated with the help of general condition 5 of the policy.

[29] General condition 5 of the policy provides as follows:

> In the event of any occurrence which might give rise to a claim under this Policy, the Insured shall:
>
> (a) immediately notify the Insurer by telephone or telegram as well as in writing, giving an indication as to the nature and extent of loss or damage;
>
> (b) take all steps within his power to minimize the extent of the loss or damage.
>
> (c) …
>
> (d) …
>
> Upon notification being given to the Insurer under this condition, the Insured may carry out the repairs or replacement of any minor damage, in all other cases a representative of the Insurer shall have the opportunity of inspecting the loss or damage before any repair or alteration are effected. If a representative of the Insurer does not carry out the inspection within a period of time that could be considered adequate under the circumstances the Insured is entitled to proceed with the repairs or replacement. The liability of the Insurer under this Policy in respect of any item sustaining damage shall cease if the said item is not repaired properly without delay.

[30] Thus, it is submitted for the respondent that the general condition 5 of the policy is to require the respondent to intervene in exactly the way it did in this case in order to minimise the extent of loss or damage. To the respondent, the imposition on the respondent of a duty, to act in this way to prevent the occurrence of further and more serious loss or damage, is balanced by an implied obligation on the part of the appellant to indemnify the respondent in respect of the cost of remedial measures.

[31] With respect, we are unable to agree. We share the view of the applicant that the policy must be read as a whole. Therefore, general condition 5 must be read in the light of both endorsement 105 and general condition 3. The second paragraph of endorsement 105 expressly states as follows:

> Loss or damage to the above-mentioned structures is only covered if, prior to the commencement of the works, their condition is satisfactory and/or the necessary safety measures have been taken. The Insured shall produce together with the Insurer a report stating the condition of the structures before the beginning of the works.

[32] The above paragraph did not indicate that the costs incurred in taking the necessary safety measures will be indemnified by the appellant. In fact the third paragraph of endorsement 105 expressly states that:

> Should further safety measures become necessary during construction, the expense incurred for such measure *are not indemnifiable under the policy*.

[33] Thus, to us, the respondent's claim in respect of remedial works to save the structure of phase I are merely safety measures which became necessary during the construction, and, by virtue of the above clause, are not recoverable. Our view is further supported by general condition 3 which provides as follows:

> The Insured shall at his own expense take all reasonable precautions and comply with all reasonable recommendations of the Insurers to prevent loss, damage or liability and comply with statutory requirements and manufacturers' recommendations. The above provision clearly states that reasonable precautions taken, to prevent loss or damage are at the respondent's expense.

[34] Thus, taking the policy as whole, we are of the view that the appellant can only be liable for the loss or damage resulting from piling works if the building of phase I either collapsed wholly or partially. The word 'collapse' has been defined to mean 'to undergo or experience a falling-in, shrink suddenly together, break down, give way, cave-in' (see Vol I, p 438 of the *New Shorter Oxford Dictionary*). In other words, the building in phase I must fall down either totally or partially, for the appellant to be liable. But in our case, it is undisputed that, although phase I building suffered serious cracks and settlement, it remained standing.

[35] The learned counsel for the respondent has invited the court to adopt a more liberal interpretation of the word 'collapse' in line with the American cases which have defined the word collapse to mean, 'the settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building' (see *Anderson v Indiana Lumbermen's Mutual Insurance Co of Indianapolis, Indiana* 127 Southern Reporter (2nd Series) 304 (CA)). Thus, according to learned counsel for the respondent, to interpret the words 'total or partial collapse' appearing in endorsement 105 to mean standing aside until the crashing down of glass and mortar to validity a claim would mean to give an interpretation which will produce an absurd result. We were urged to construe the policy document based on its practicality and not strictly, so as to give effect to the presumed commercial purpose. The case of *Pans Food Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* [2000] 74 ALJR 79 (HC) was cited as the authority to support the said proposition.

[36] With respect, we are unable to agree. To us the word 'collapsed' has only one ordinary meaning, ie falling or shrinking together or breaking down or giving way through external pressure or loss of rigidity or support which means that the building must cave in or fall down. Thus, when the words of the policy are crystal clear, those words must be given effect to. Moreover, as stated earlier the policy must be read as a whole. General condition 5 must be read in the light of both endorsement 105 and general condition 3. A paragraph in endorsement 105 expressly states that safety measures are not indemnifiable under the policy. Further, general condition 3 expressly states that reasonable precautions to prevent loss or damage are at the respondent's expenses.

[37] For the abovementioned reasons, we are of the view that the costs incurred by the respondent for the necessary safety measures are not indemnifiable under the policy. Accordingly, the appeal is allowed with costs here and in the court below and that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Sugandra Rao